TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~340.~~ 111

WILLIAM C. HALL AND JOHN S. LONG, DOING BUSINESS UNDER THE FIRM AND STYLE OF HALL & LONG, PLAINTIFFS IN ERROR,

VS.

THE NASHVILLE AND CHATTANOOGA RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED NOVEMBER 26, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 310.

WILLIAM C. HALL AND JOHN S. LONG, DOING BUSINESS UNDER THE FIRM AND STYLE OF HALL & LONG, PLAINTIFFS IN ERROR,

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THE NASHVILLE AND CHATTANOOGA RAILROAD COMPANY.

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INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service	4	1
Bond	7	3
Summons	8	3
Declaration	10	4
Demurrer	14	6
Judgment	18	7
Clerk's certificate	19	8
Assignment of errors	20	8

1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the middle district of Tennessee, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between William C. Hall and John S. Long, under the firm-name and style of Hall and Long, citizens of the State of Kentucky, who sue for the use of The Kentucky Fire & Marine Insurance Company, and The Union Insurance Company of Louisville, corporations chartered by the State of Kentucky, and located and doing an insurance business there, plaintiffs, and The Nashville and Chattanooga Railroad Company, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears:

2 We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the fourth day of November, in the year of our Lord one thousand eight hundred and seventy.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

N. H. SWAYNE,
Asso. Jus. Sup. Court U. S.

NOVEMBER 4, 1870.

3 (Endorsed:) William C. Hall & als., use, &c., vs. The Nashville & Chattanooga Railroad Company. Original writ of error.

Filed in the clerk's office of the circuit court of the United States for the middle district of Tennessee, 17th November, 1870.

E. R. CAMPBELL, *Clerk.*

4 The United States of America to the Nashville and Chattanooga Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Tennessee, wherein William C. Hall & John S. Long, under the firm-name & style of Hall & Long, citizens of the State of Kentucky, who sue for the use of The Kentucky Fire and Marine Insurance Company, and The Union Insurance Company of Louisville, corporations chartered

by the State of Kentucky, and located and doing an insurance business there, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Noah H. Swayne, associate justice of the Supreme Court of the United States, this fourth day of November, in the year of our Lord one thousand eight hundred and seventy.

N. H. SWAYNE,
Asso. Jus. Sup. C't U. S.

5 I, Tho's J. Harrison, U. S. marshal, middle district of Tennessee, hereby deputize and specially appoint M. T. Sanders to execute and return the within citation, as the law commands.

T. J. HARRISON,
U. S. Marshal M. D. Tenn.

Come to hand 17 day of Nov., 1870.

M. T. SANDERS,
Special Deputy.

This process was legally executed by making known the contents of this writ to E. W. Cole, president of the Nashville & Chattanooga Railroad Company, and delivering to him a copy of this citation, on this the 17 day of Nov., 1877.

T. J. HARRISON,
Marshal.
By M. T. SANDERS,
Special Deputy.

Filed in the clerk's office of the circuit court of the United States for the middle district of Tennessee, 17th November, 1870.

E. R. CAMPBELL, *Clerk.*

(Indorsed:) William C. Hall & als., use, &c., vs. The Nashville & Chattanooga Railroad Company. Original citation.

6 *Affidavit of service of citation.*

UNITED STATES OF AMERICA,
Middle District of Tennessee:

Personally appeared M. T. Sanders before me, clerk of the circuit court of the United States for the middle district of Tennessee, and makes oath that he delivered a true copy of the within citation to E. W. Cole, president of The Nashville and Chattanooga Railroad Company, on the 17th day of November, 1870, in the city of Nashville, and State of Tennessee, as special deputy, appointed by Tho's J. Harrison, United States marshall for the middle district of Tennessee.

M. T. SANDERS.

UNITED STATES OF AMERICA,
Middle District of Tennessee:

Subscribed and sworn to by M. T. Sanders before me, clerk of the circuit court of the United States for the district aforesaid.

Given under my hand and the official seal of said court this 21st day of November, 1870.

[SEAL.]

E. R. CAMPBELL,
Clerk U. S. Circuit Court.

7 Know all men by these presents that we, William C. Hall and John S. Long, as principals, & William Atwood, as surety, are held and firmly bound unto The Nashville and Chattanooga Railroad Company in the full and just sum of two hundred and fifty dollars, to be paid to the said Nashville and Chattanooga Railroad Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this fourth day of November, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately, at a circuit court of the United States for the middle district of Tennessee, in a suit depending in said court, between William C. Hall and others, plaintiffs, and The Nashville and Chattanooga Railroad Company, defendant, judgment was rendered against the said plaintiffs, and the said plaintiffs having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next.

Now, the condition of the above obligation is such that if the said William C. Hall and John S. Long shall prosecute the said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

W'M ATWOOD, *Surety.* [L. S.] [L. S.] [L. S.]

Approved by—
(S'gn'd)

N. H. SWAYNE,
Asso. Jus. S. C. U. S.

(Indorsed:) William C. Hall & als., use, &c., vs. The Nashville & Chattanooga Railroad Company. Copy bond.

Copy of bond filed in the clerk's office of the circuit court of the United States for the middle district of Tennessee, on the 17th of November, 1870.

E. R. CAMPBELL, *Clerk.*

8 UNITED STATES OF AMERICA,
Middle District of Tennessee:

At a circuit court of the United States for said district, begun and held at the capitol of said State, at Nashville, on the third Monday, being the 19th day of October, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the United States the 93d year—

Present, the Honorable Connally F. Trigg, Judge of the district court of the United States for the several districts of Tennessee; present also, Edward R. Campbell, clerk of said court, and Edwin R. Glascock, marshal—

The following proceedings were had, to wit:

On the 5th day of March, 1867, a summons issued, which is in the words and figures following, to wit:

The President of the United States of America to the marshal of the middle district of Tennessee, greeting:

You are hereby commanded to summon The Nashville and Chattanooga Railroad Company, a corporation chartered by the general assembly of the State of Tennessee, and having its principal office and place of business in Nashville, in said State, and a citizen of said State, if to be found in your district, to be and appear before the judges of the circuit court of the United States, in the sixth circuit, for the district of middle Tennessee, at the Federal court-room, at Nashville,
9 in said State, on the third Monday in April next, then and there to answer W'm C. Hall and John S. Long, trading as Hall and Long, citizens of the State of Kentucky, who sue for the use of The Kentucky Marine and Fire Insurance Company and The Union Insurance Co. of Louisville, corporations chartered by the State of Kentucky, and citizens of the State of Kentucky, of a plea of trespass on the case to the plaintiff's damage ten thousand dollars.

Herein fail not, and have then and there this writ.

Witness the Honorable Salmon P. Chase, Esq., Chief Justice of the Supreme Court of the United States this the third Monday in October, in the year of our Lord eighteen hundred and sixty-seven, and of the independence of the United States the 91st year.

E. R. CAMPBELL, *Clerk.*

Return.

Executed on F. A. Gaines, secretary of Nashville and Chattanooga Railroad Co., (the president being absent from district,) and delivered a copy declaration M'ch 9th, 1867.

E. R. GLASCOCK, *U. S. M. M. D. T.*
By R. E. CAIN, *D. M.*

On the 5th day of March, 1867, a declaration was filed, which is in the following words, to wit:

10 *Declaration.*

Circuit court of the United States for the middle district of Tennessee, sitting at Nashville. Term, 1867.

HALL AND LONG
v.
THE NASHVILLE AND CHATTANOOGA R. R. CO.

William C. Hall and John S. Long, commission merchants, (doing business under the firm-name and style of Hall and Long,) citizens of the State of Kentucky, (for use of The Kentucky Fire and Marine Insurance Company and The Union Insurance Company of Louisville, corporations chartered by the said State of Kentucky, and located and doing an insurance business there,) sue the defendants, The Nashville and Chattanooga Railroad Company, a corporation located and doing business in the State of Tennessee, to answer the plaintiffs of a plea of trespass on the case upon promises.

For that whereas the said defendant, before and at the time of the making of said promise and undertaking hereinafter next mentioned, was a common carrier of chattels and goods for hire, in and by a certain railroad from a certain place, to wit, from Chattanooga, Tennessee, to Nashville, in the same State.

And the said defendant being such carrier, plaintiff, at the special instance and request of said defendant, caused to be delivered to
11 him eighteen (18) bales of cotton, marked as follows: five (5) bales marked "H. H.;" four, (4,) "H. M. and Co.;" and one, (1,) "T. H.;" and four, (4,) "Hyena"—property of the said plaintiffs, of great value, to wit, of the value of ten thousand dollars, to be safely carried and conveyed as such carrier by railroad to Nashville, and then and there to be safely and securely delivered for the said plaintiffs by the said defendant.

And in consideration thereof, and of certain reward to the defendant in that behalf, he undertook and faithfully promised the plaintiffs to take care of and safely carry the same by its said cars or railroad to Nashville, and there safely deliver the same to plaintiffs; and although the said defendant received said cotton for the purpose aforesaid, not regarding its duty, promise, and undertaking, but intending to deceive and injure the plaintiffs, did not take care of said cotton and safely convey the same to Nashville as aforesaid.

Nor has he safely and securely delivered the same for the said plaintiffs, but so carelessly and negligently behaved itself with respect to the cotton that, through carelessness, negligence, and improper conduct of defendant and its servants in this behalf, the said cotton being of the value aforesaid, became and was wholly lost to the said plaintiffs.

12 And whereas, also, afterwards, on the day and year aforesaid, at, &c., aforesaid, in consideration that the said plaintiffs, at the special instance and request of defendant, had caused to be delivered to it eighteen other bales of cotton of like quality, description, and value as those in the said first count mentioned, to be taken care of and safely carried and delivered at Nashville, Tennessee, by the said defendant for the said plaintiffs, for certain rewards to the said defendant in that behalf, and it undertook and faithfully promised the said plaintiffs to take care of the said last-mentioned cotton, and carry and deliver the same to the said plaintiffs in a reasonable time, then next following; and although the defendant had received said cotton for the purpose aforesaid and a reasonable time for the carriage, conveyance, and delivery thereof has elapsed; yet the defendant, not regarding its promise and undertaking, did not nor would within such reasonable time, or at any time afterwards, although often so requested, safely carry and deliver said cotton for plaintiffs, but has hitherto neglected and refused, whereby the said cotton has been and is wholly lost to said plaintiffs.

And whereas, also, heretofore, to wit, at, &c., in consideration that the said defendant at its special instance and request, had the care and
13 custody of divers goods and chattels of the said plaintiffs, to wit, goods and chattels of the like number, quality, quantity, description, and value of those in the first count mentioned, it, the said defendant undertook, and then and there promised the said plaintiffs, whilst it had the care and custody of the same, to carry and deliver the same at Nashville, Tennessee. Yet the said defendant whilst it had the care and custody of the same, not regarding its promise and undertaking, but intending to injure and defraud the plaintiffs, took so little and such improper care of said cotton that the same afterwards, on the day and

year aforesaid, became and was totally and accidentally destroyed by fire and wholly lost to plaintiffs.

And plaintiffs further aver that they had procured policies of insurance on said cotton in said insurance companies hereinbefore named, amounting to dollars. That said insurance extended from the day of , 1865, to the day of next thereafter; that, on the day of , 1865, and before the expiration of the policies of insurance on said cotton, the same was delivered to the said defendant as a common carrier, &c., and which was not safely carried and delivered as aforesaid, but were totally and accidentally destroyed by fire, whereby said insurance companies became and were responsible for the value of the same, which was duly paid to plaintiffs, under and by virtue of their policies of insurance, whereby the said insurance companies became entitled to demand and receive from said defendant, by way of subrogation to plaintiffs' right, the amount of money paid by them as aforesaid to the said plaintiffs. Hence this suit in plaintiffs' name to the use of said insurance companies for ten thousand dollars damages.

HOUSTON, EAST AND SPURLOCK,
Atto's for Plaintiffs.

Pleas and demurrer.

On the day of , 186 , the following plea was filed:

HALL AND LONG
v.
THE NASHVILLE AND CHATTANOOGA R. R. CO.

3. And the said defendant, by attorney, comes and defends the wrong and injury, when, &c., and as to the first count in the declaration mentioned says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, in manner and form, as the said plaintiffs have above complained against it; and of this it puts itself upon the country.

15 2. And for further plea, as to the second count in the said declaration, the defendant says, actio non, because it says, that it did not undertake and promise in manner and form as in the second count alleged; and of this it puts itself upon the country.

3. And for further plea, as to the said first and second counts, the defendant says, actio non, because it says that, at or about the time of the delivery of the said cotton in the said counts mentioned by the plaintiffs to defendant as a common carrier, if the same were actually delivered, the said plaintiffs insured the same against loss by fire, during its transit from the point of delivery to the terminus of the voyage, and while in the possession of the defendant as a common carrier as alleged by the said Kentucky Marine and Fire Insurance Company and The Union Insurance Company of Louisville, for whose use this suit purports to be brought for a good and sufficient consideration, to wit: dollars premium of insurance then and there paid by the said plaintiffs to said insurance companies, to the full value thereof, and said cotton was subsequently, and while so insured, accidentally, without any fault of the defendant, set on fire and totally consumed and destroyed by fire,

16 constituting a total loss within the meaning of the policies of insurance taken out thereon as aforesaid, whereby the said insurance companies became bound to pay, and did pay to the plaintiffs the full value of the said cotton before the commencement of this suit,

whereby the said plaintiffs were fully paid for the said cotton, and could not again sue for and recover the value thereof against the defendant, and their right of action was extinguished and could not pass by operation of law or subrogation, or be assigned by contract by the plaintiffs to the said insurance companies, and any contract so to assign said right of action was and is champertous and void; and this the defendant is ready to verify, wherefore, &c.

W. F. COOPER,
Atto. for Def't.

4. And the said defendant, as to the third count in the said declaration, by attorney, comes and demurs to the said count, for that it contains no matter in law sufficient to sustain an action against this defendant in manner and form as claimed; and, on the contrary, upon its face contains a full defence to the demand set up therein; wherefore defendant submits whether it should make any further or other defence.

W. F. COOPER,
Atto. for Def't.

On the 6th day of May, 1867, the following entry was made on the minutes:

17 HALL AND LONG, TO USE, &C.,
v.
NASHVILLE AND CHATTANOOGA RAILROAD Company.

This cause is continued until next term of the court, on account of the absence of counsel of both plaintiffs and defendant.

On the 14th day May, 1867, a' entry was made on the minutes, which is as follows, to wit:

HALL AND LONG, TO USE, &C.,
v
NASHVILLE AND CHATTANOOGA RAILROAD Company.

In this cause by consent of parties, plaintiffs are permitted to change their cause of orator to assumpsit, and the cause is to stand for trial at the October term next, upon demurrer.

On the 20th day of November, 1868, the following judgment was entered on the minutes:

HALL AND LONG TO USE, &C.,
v.
NASHVILLE AND CHATTANOOGA R. R. CO.

18 The parties appear, by their attorneys, and the matter of demurrer having been fully heard by the court, and the court being of the opinion that The Kentucky Marine & Fire Insurance Company and The Union Insurance Company of Louisville, for whose use this suit is brought, are not entitled, by virtue of anything in the facts shown by the pleadings and admitted by the demurrer, to be subrogated

to the rights of the plaintiffs Hall & Long against the defendant upon the causes of action in the declaration mentioned; and that, consequently, the defendant's demurrer to the third count of the plaintiffs declaration is well taken, and that the demurrer of the plaintiffs to the defendants third plea to the first & second counts of the declaration is not well taken.

It is therefore considered by the court that the defendants' demurrer be sustained and the plaintiffs' demurrer be overruled; and, the plaintiffs declining to take further action upon the pleas of defendant, it is further considered by the court that the defendant go hence without day, and that the defendant recover of the plaintiffs the costs of this cause, for which executions may issue against them and John L. Spurlock and Edward H. East, their securities for the prosecution, for which execution may issue.

UNITED STATES OF AMERICA,
Middle District of Tennessee, ss:

I, Edward R. Campbell, clerk of the circuit court of the United States for the district aforesaid, do hereby certify that the foregoing is a true and perfect transcript of the record and of all the proceedings in the case of Hall & Long, to use, &c., against The Nashville & Chattanooga Railroad Company, as remains of record in my office.

In testimony whereof I have hereunto set my hand, and affixed the seal of our said court at Nashville, in said district, this the 21st day of November, 1870, and the 95th year of American independence.

[SEAL.] E. R. CAMPBELL, *Clerk.*

W'M C. HALL, &C., USE, &C., PLAINTIFFS IN ERROR.
vs.
THE NASHVILLE & CHATTANOOGA RAILROAD COMPANY, DEFENDANT IN ERROR.

Assignments of error.

First. The court below erred in sustaining the demurrer of the defendant to the third court in plaintiffs' declaration.

Second. Also erred in overruling the demurrer of plaintiffs to the defandant's third plea to the first and second counts in plaintiffs' declaration.

Third. And also erred in rendering judgment for the defendant.

W'M ATWOOD,
Att'y for Plaintiffs in Error.

(Indorsement on cover:) No. 310. William C. Hall and John S. Long, doing business under the firm & style of Hall & Long, pl'ffs in error, vs. The Nashville & Chattanooga Railroad Company, def't in error. M. Tennessee C. C. U. S. Filed 26 day of November 1870.

SUPREME COURT OF THE UNITED STATES.

HALL & LONG, who sue for the use of the Kentucky Marine and Fire Insurance Company and the Union Insurance Company of Louisville, — *Plaintiffs in Error.*

VERSUS

THE NASHVILLE & CHATTANOOGA RAILROAD COMPANY, — *Defendant.*

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

BRIEF FOR PLAINTIFFS IN ERROR BY WM. ATWOOD, Esq.

In this case the declaration was filed by the plaintiffs in error in the Circuit Court of the United States for the Middle District of Tennessee, sitting at *Nashville*, on the 5th day of March, 1867. They allege that they were citizens of the State of Kentucky, and commission merchants, who sue for the use of the Kentucky Marine and Fire Insurance Company and the Union Insurance Company of Louisville, corporations chartered by the State of Kentucky, and located and transacting an insurance business there, and that they bring their suit against the defendant in error, the Nashville and Chattanooga Railroad Company, a corporation located and doing business in the State of Tennessee, in an action of trespass on the case. And in the *first* count they allege that the said defendant was a common carrier for hire by its rail-

road from Chattanooga to Nashville, Tennessee; and that the plaintiffs delivered to the defendant eighteen bales of cotton, the property of the plaintiffs, of the value of ten thousand dollars, to be transported by said railroad to Nashville, and there delivered to the plaintiffs; and that in consideration thereof, and of certain reward to the defendant in that behalf, it undertook and promised the plaintiffs to take care of and safely carry said cotton by its cars or railroad to Nashville, and there deliver the same to plaintiffs; and that, although the defendant received said cotton for the purpose aforesaid, it did not take care of said cotton, and safely convey the same to Nashville, nor deliver the same to the plaintiffs there; but that by the negligence and improper conduct of the defendant and its servants the said cotton became wholly lost to the plaintiffs.

In the *second* count the plaintiffs allege that in consideration that they, at the special instance and request of the defendant, had caused to be delivered to it eighteen other bales of cotton of like quality, description, and value as those in the first count mentioned, to be taken care of and safely delivered at Nashville by the said defendant for the said plaintiffs for certain reward to the defendant in that behalf, it undertook and promised the plaintiffs to take care of said last-mentioned cotton, and carry and deliver the same to the plaintiffs in a *reasonable time* then next following; and that although said defendant had received said cotton for the purpose aforesaid, and a *reasonable time* for the carriage, conveyance, and delivery thereof had elapsed, yet the defendant did not and would not within such reasonable time, or at any time afterward, although often requested, safely carry and deliver said cotton for plaintiffs, but had hitherto neglected and refused to deliver said cotton, whereby the same became wholly lost to the plaintiffs. And in the *third* count they allege that in consideration that the defendant, at its special instance and request, had the care and custody of

divers goods and chattels of the plaintiffs—viz., goods and chattels of the like number, quality, quantity, description, and value of those in the first count mentioned—it, the said defendant, undertook and promised the plaintiff, whilst it had the care and custody of the same, to carry and deliver the same at Nashville, Tennessee; yet that the defendant, whilst it had the care and custody of the same, took so little and such improper care of said cotton that the same afterward became and was totally and *accidentally* destroyed by *fire*, and thus wholly lost to the plaintiffs. And plaintiffs further averred that they had procured policies of insurance on said cotton in said insurance companies amounting to . . . . dollars; that said insurance extended from the . . day of . . . , 1865, to the . . day of . . . next thereafter; that on the . . day of . . . , 1865, and before the expiration of the policies of insurance on said cotton, the same was delivered to the defendant as a common carrier, which was not safely carried and delivered as aforesaid, but was totally and *accidentally* destroyed by fire, whereby said insurance companies became and were responsible for the value of the same, which was duly paid plaintiffs under and by virtue of their policies of insurance, whereby the said insurance companies became entitled to demand and receive from said defendant, by way of *subrogation* to plaintiffs' right, the amount of money paid by them as aforesaid to the said plaintiffs; hence this suit in plaintiffs' name, to the use of said insurance companies, for ten thousand dollars damages. (See Declaration, Rec. 10—15

To the *third* count in the declaration the defendant demurred. (Rec. 16 12.)

To the *first* count it pleaded *not guilty*. (Rec. 16 12.)

To the *second* count it pleaded *non-assumpsit*. (Rec. 16)

And to the *first* and *second counts* it further pleaded, that about the time of the delivery of said cotton by the plaintiffs to defendants as a common carrier, the said plaintiffs insured

the same against loss by fire during its transit from the point of delivery to the terminus of the voyage, and while in the possession of the defendant as common carrier, as alleged, by the said Kentucky Marine and Fire Insurance Company and the Union Insurance Company of Louisville, for whose use the suit purports to be brought for a good and sufficient consideration; to-wit: . . . . dollars, premium of insurance, then and there paid by the said plaintiffs to said insurance companies to the full value thereof; and that said cotton was subsequently and, while so insured, *accidentally*, without *any fault* of the *defendant*, set on fire, and totally consumed and destroyed by *fire*, constituting a *total* loss within the meaning of the policies of insurance taken out thereon, as aforesaid, whereby the said insurance companies became bound to pay and did pay to the plaintiffs the full value of the said cotton before the commencement of this suit, whereby said plaintiffs were fully paid for the said cotton, and could not again sue for and recover the value thereof against the defendant; and their right of action was extinguished and could not pass by operation of law or subrogation, or be assigned by contract by the plaintiffs to the said insurance companies; and any contract so to assign said right was and is champertous and void, etc. (Rec. p. 16.) To the third and last plea the plaintiffs demurred.

On the 14th day of May, 1867, an entry was made on the minutes to the following effect: that by *consent* of parties plaintiffs are permitted to change their cause of action to *assumpsit*, and the cause was to stand for trial at the ensuing October term next thereafter upon *demurrer*. (Rec. p. 17.) On the 20th of November, 1868, the court rendered judgment to the following effect: The parties having appeared by their attorneys, and the matter of demurrer having been fully heard, the court decided that the Kentucky Marine and Fire Insurance Company and the Union Insurance Company of Louisville, for whose use the suit was brought, were

not entitled, by virtue of anything in the facts shown by the pleadings and admitted by the demurrer, to be *subrogated* to the rights of the plaintiffs, Hall and Long, against the defendant, upon the causes of action in the declaration mentioned; and that consequently the defendant's demurrer to the *third count* of the plaintiffs' declaration was well taken, and that the demurrer of the plaintiffs to the defendant's *third plea* to the first and second counts of the declaration was *not* well taken; and rendered judgment that the defendant's demurrer be *sustained*, and that the plaintiffs' demurrer be *overruled*. And, the plaintiffs declining to take further action upon the pleas, the court directed that the defendant go hence without day, and that the defendant recover of the plaintiffs the costs of the suit, for which an execution might issue against them. (See judgment, Rec. 18-19.) From this judgment a writ of error has been sued out to this court by the plaintiffs, and they make the following assignments of error.

I.

ASSIGNMENTS OF ERROR.

1. The court below erred in sustaining the demurrer of the defendant to the third count in plaintiffs' declaration.

2. The said court also erred in overruling the demurrer of plaintiffs to the defendant's third plea to the first and second counts in plaintiffs' declaration.

3. And also erred in rendering said judgment for the defendant.

II.

THERE BEING NO CONTRACT EXEMPTING THE CARRIER FROM LOSS BY FIRE, HE IS RESPONSIBLE FOR A LOSS RESULTING FROM AN ACCIDENTAL FIRE, EVEN WHERE IT IS WITHOUT FAULT ON HIS PART.

The facts in the case are stated in plaintiffs' declaration. The third plea of the defendant also states the facts in

which the statement of the defendant substantially concurs with that of the plaintiffs. There is no dispute about the facts. The defendant was a common carrier by its railroad from Chattanooga to Nashville, Tennessee. As such it received the cotton in controversy at Chattanooga and agreed to transport it to Nashville. While in the custody of the defendant as common carrier it was totally destroyed by an *accidental* fire, occurring without the *fault* of the defendant. The loss to the plaintiffs was total, and the underwriters on the cotton paid them to the full extent of its value before the commencement of this suit. The third plea of the defendant does not set up that the fire was caused by *lightning* or other act of God. It resulted then from the intervention of man and not of God. True, it was without fault. It was also accidental in the sense that it was not *designedly* brought about by the defendant. It was also perhaps unforeseen. The plea shows no act of God in the matter; neither does it show any contract exempting the carrier from loss by fire. There was no such contract. Then the liability of the defendant was fully and entirely the liability of a carrier at the *common law*. He is an insurer against all events except two—the act of God and the public enemies. In this case there were no public enemies; neither was there an act of God; therefore the carrier must be responsible for the loss.

In England the law upon this subject has long since been settled. In a well-known case the property was destroyed by fire while in custody of the carrier without any *negligence* on *his* part; yet the court held that as the fire was not the result of *lightning* or other act of God, it must have happened by the intervention of man, against which the carrier was an insurer, and that therefore the carrier was liable. (1 Term R. 27, Forward *vs.* Pittard.) To the same effect is another English case. (5 Term R. 389, Hyde *vs.* Trent and Mersey Navigation Company.) And in our own

country, in a case from Mississippi, where cotton was shipped on board of a steamboat under a bill of lading exempting the owners of the boat from any loss arising from the "dangers of the river," and when the cotton was destroyed by an *accidental* fire and did not arise from the negligence of the boat, it was held that such a loss was not an "act of God" according to the common law; and further, that the carrier was not exempted from this loss by reason of the exception in the bill of lading of "dangers of the river;" or, in other words, that if the carrier desired to be relieved from responsibility for losses from *fire*, he should have inserted the exception of *fire* in the bill of lading. (1 Smedes & Marshall, 279, Gilmore *vs.* Carman.) In Pennsylvania also the carrier has been held liable for losses resulting from fire. (2 Watts, 443, Harrington *vs.* McShane.) And in several cases from South Carolina the same point has been ruled the same way. (Dudley's Law and Eq. R. 159, Patton *vs.* McGrath; 2 Richardson Law R. 286, Swindler *vs.* Hilliard; 1 Strobhert Law R. 203, Singleton *vs.* Hilliard.) And in this court, in the case of the New Jersey Steam Navigation Company *vs.* Merchants Bank, where the loss of the coin was from fire, the court held that the liability of the carrier for the loss by fire was undoubted without some express *exception* of such loss; and even under the special agreement in that case the court held the carrier liable on the ground of negligence occasioning the fire. (6 Howard S. C. R. 344, 381, New Jersey Steam Navigation Company *vs.* Merchants Bank.) And in a later case in this court, where there was a special contract for the transportation of cotton from Memphis to Boston in the form of a bill of lading, containing a clause exempting the carrier from liability for losses by *fire*, and the cotton was destroyed by fire, and the loss was not produced by any negligence on the part of the carrier, it was held the carrier was exempt by reason of the special *contract;* but it was most distinctly

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intimated that but for the *special exemption* the carrier would have been liable. (3 Wallace S. C. R. 107, York Company *vs.* Central Railroad.) In the present case there was no *special contract* of any kind exempting the carrier from liability for loss by fire. He stands upon his common law responsibility alone. By that law, although the fire was accidental and without fault on his part, yet as it arose from no act of God, but from the intervention of man, he is liable for the loss. And the defendant here must be liable for this loss, unless the proposition asserted by the court below be true that the underwriters, after payment of the total loss on the cotton, are not entitled to be *subrogated* to the rights of the plaintiffs, and to use their names to sue and recover for the value of the cotton.

III.

AFTER THE PAYMENT OF THE LOSS BY THE UNDERWRITERS, THEY WERE SUBROGATED TO ALL THE RIGHTS OF THE PLAINTIFFS, AND COULD USE THEIR NAMES IN A SUIT TO RECOVER THE VALUE OF THE COTTON, AND THE PAYMENT OF THE UNDERWRITERS WAS NO SATISFACTION BY THE CARRIER.

In marine insurance, where there is a constructive total loss, and the assured abandons to the underwriter, the legal effect of the abandonment is to transfer the whole interest in all that remains of the insured property, as far as it is covered by the policy, together with all the rights and liabilities arising out of its ownership, from the assured to the underwriter. By virtue of the loss and the abandonment the underwriter is subrogated into the place of the assured as complete owner of the abandoned property. And the abandonment not only transfers the remains of the abandoned property, but it completely substitutes the underwriter for the assured from the moment of loss, clothing him from that time with all the rights and responsibilities of ownership, entitling him to *prosecute all claims* which belonged to

the assured as owner of the thing insured, and rendering him liable for all just demands that might have been made against the assured in the same capacity. (2d ed. Arnould on Ins., side pp. 1178–1180.) All claims against *third parties* on account of *negligence*, or *agency* occasioning the damage to the subject, or destruction of it by a peril insured against, are legally assigned to the underwriter by an abandonment. (3d ed. Phillips on Ins., §§ 1707 and 1711.) In *actual total losses* no abandonment is necessary, and the *payment* of the total loss by the underwriter as completely subrogates him to all the rights of the assured against third parties as does the abandonment in cases of *constructive* total loss. (2d ed. Arnould on Ins., side pp. 1185, 1186; 3d ed. Phillips on Ins., §§ 1707 and 1723.)

In the English courts this question arose in a court of equity as early as the year 1748. The king having granted letters of reprisal on the *Spaniards* for the benefit of his subjects in consideration of the losses they sustained by unjust captures, the prize commissioners would not suffer the *insurers* to make claim to part of the prizes, but the *owners only*, although they were already *satisfied for their loss* by the insurers, who thereupon brought a bill in chancery against assured, who had received proceeds of prizes. Lord Chancellor Hardwicke was of opinion that the plaintiffs (the underwriters) had the plainest equity that could be. The person originally sustaining the loss was the *owner; but after satisfaction made to him*, the *insurer*. No doubt but *from that time*, as to the goods themselves, if restored in *specie*, or compensation made for them, the assured stands as a trustee for the insurer in proportion for what he paid, although the commissioners did right in avoiding being entangled in accounts and in adjusting the proportion between them, etc. And it was held the underwriters were entitled, as salvage, to the proceeds of the Spanish ship, captured by way of reprisals, which had been distributed by the British Government

amongst the assured. (1 Vesey, sr. 98, Randall *vs.* Cochran.) And in the courts of law of England the same position has been maintained. Where the underwriters have paid the amount of the loss occasioned by the demolition of a house by rioters in the riots of 1790 in England, they may maintain an action in the *name* of the *assured* against the hundred, which action was given the assured by the statute of 1 George I., chap. 5, sec. 6. It was also held that the rioters were trespassers, and could *not* have pleaded payment by underwriters by way of accord and satisfaction of the trespass. And Buller, Justice, said: "The best way was to consider this case as a contract of indemnity, in which the principle is that the insurer and the insured are as one person, and in that light the paying before or after can make no difference." And the hundred was held liable to the full extent of the damage. (2 Mars. on Ins. 794, reporting the case of Mason *vs.* Sainsbury.) And in another case, arising out of the same statute, where the owner of certain stacks of hay and corn which were maliciously set on fire received the amount of his *loss* from an insurance office, it was held that he might nevertheless maintain an action against the hundred. (2 Barnwell & Creswell, 254, Clark *vs.* Inhabitants of Blything.) In another English case, where the plaintiff sued the defendants for damaging his ship by collision, it was held that the defendants were not entitled to deduct from the amount of damage to be paid by them a sum of money paid to plaintiff by the *insurers* in respect to such damage. The court held also that the payment by the underwriters must be considered as made without *prejudice* to any one's rights, and *not* in *satisfaction* of the injury. The owner had the legal right to bring the suit, and the legal right to the damages. But it was held that after he obtained the damages the underwriters might call on him to account as trustee for them. (4 Bingham New Cases, 272, Yates *vs.* White.)

In our own country, in the State of Pennsylvania, it was

held that a shipper who received from the underwriter the part of the loss insured against may sue the carrier on the contract of bailment, not only in his own right for the unpaid balance due to *himself*, but as trustee for what has been paid by the underwriter in ease of the carrier; that upon the trial the court will *restrain* the carrier from setting up the underwriter's payment of his part of the loss as a *satisfaction* for so much of the demand at law; that the carrier can not, in case of his own liability, call upon the underwriter for contribution upon the principle of double insurance; that the carrier in this sense is not an insurer, though he may be for other purposes, and is sometimes so called; that the payment of the underwriter was made in discharge of his own contract and duty, and not of the carriers, nor at the carrier's instance. (11 Penn. R. 515, Gales *vs.* Hailman.)

And in a South Carolina case, where goods were shipped on board of a steamboat, and were afterward damaged, the underwriter who had insured the goods advanced the money to the extent of the damage to the shipper after the damage had occurred, and suit was then brought by the shipper and consignor, who was the party insured, against the owners of the steamboat for the full amount of the damage, and the court held the action maintainable against the carrier; that it was not like the case of double insurance at the common law; that the carrier was primarily liable, and might be sued by the shipper for the benefit of the insurer, even although the insurer had previous to the suit advanced to the shipper the full amount of the damage. (Burnside *vs.* The Union Steamboat Co., 10 Richard. S. C. L. R. 113.) In this South Carolina case the suit was brought in the name of the consignor, who was the insured party, and had been paid by the underwriter against the carrier. But if the goods were shipped to a consignee named in a bill of lading or railroad receipt, the presumption of law would be that the *consignee* was the owner, or was such an agent or factor of the owner

that the consignee could bring the suit against the carrier. He who made the contract with the carrier should bring the suit as a general rule. (2d ed. Angell on Carriers, secs. 499–510; Elkins *vs.* Boston and Maine Railroad, 19 N. H. 337.) The *consignee* can bring the suit against the carrier. (Lawrence *vs.* Minturn, 17 Howard S. C. R. 100.)

If the consignee be insured, and the goods are lost by the carrier, and the underwriter pays the consignee, the underwriter has the undoubted right to be subrogated to all the rights of the consignee against third persons. In other words, whether the underwriter insures consignor or consignee, and a loss occurs, which the underwriter pays, he becomes the legal assignee of all the rights of the assured against all third parties, and can use the name of the assured in bringing the suit. In a Massachusetts case, where a shop adjoining a railroad was destroyed by fire, communicated by a locomotive engine of the railroad, and while the shop was burning the wind wafted sparks from the burning shop across a street sixty feet upon plaintiff's house and set it on fire, whereby it was injured, it was held that the plaintiff, the owner of the house, was entitled to recover of the railroad company the damages caused by the fire, under a statute of that state of 1840, chap. 85, sec. 1, which provided that when any injury was done to a building of any person by "fire communicated" by a locomotive engine of a railroad corporation, the said corporation should be responsible in damages to the person injured. And as the plaintiff's house, which was *insured*, was injured by the fire communicated by the locomotive engine of said railroad company, and the underwriters had paid the plaintiff the amount of his loss for which the railroad company was also by law responsible to plaintiff, it was further held that such payment did *not bar* plaintiff's right to recover also of the said railroad company, and that plaintiff by receiving *payment* of the underwriters became

trustee for them, and by necessary implication had made an *equitable assignment* to them of his right to recover of this railroad company, and that the underwriters, on indemnifying the plaintiff, might bring an action in *his name* for their own benefit, and that the plaintiff could *not* even *release* such an action, which he had attempted to do. And the court, amongst other things, said: "Now, when the owner, who *prima facie* stands to the whole risk and suffers the whole loss, has engaged another person to be at that particular risk for him in whole or in part, the owner and insurer are, in respect to that ownership and the risk incident to it, in effect *one person*, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If therefore the owner demands and receives payment of that very loss from the insurer, as he may by virtue of his contract, there is a manifest equity in transferring the right to indemnity which he holds for the common benefit to the assurer. It is one and the same loss for which he has a claim of indemnity, and he can equitably receive but one satisfaction. The liability of the railroad company was first and principal, and that of the insurer secondary; not in order of time, but in order of ultimate liability," etc. (13 Metcalfe Mass. R. 99, Hart *vs.* Western Railroad Corporation.) According to this Massachusetts case then the underwriters here, having paid the loss to the plaintiffs in error, were not only subrogated to all their rights against the defendant in error, and could use their name to prosecute this suit, but the plaintiffs in error could not even *release* the railroad company without the consent of the underwriters.

Where the underwriter pays the loss, the suit must be brought against the carrier in the name of the assured, and the underwriter can not bring it in his *own name*. This was decided expressly in the State of Maine. (39 Maine, 253, Rockingham Mutual Fire Insurance Company *vs.* Bosher.)

And this same point has been brought directly to judgment in the State of Illinois. The defendants in error, in the case from that state, were in possession and running the Logansport, Peoria & Burlington Railroad on the 13th of August, 1863. On that day their freight-train, passing westward, set fire to the warehouse of Graft & Webster, in Peoria county, Illinois, and the building with its contents were consumed. Graft & Webster gave notice of their loss to the insurance company, the *plaintiff* in the action, which, in its turn, gave notice to the defendants, informing them that the insurance company would hold them liable; and at the expiration of the time fixed by the policy the insurance company paid Graft & Webster their loss. The insurance company brought a common law action against the defendants in its *own name* instead of the *name of the assured*, alleging the fire to have been caused by gross carelessness of railway company, and the only question in the case was whether the liability could be enforced in the name of the *insurance company*, or whether it must be brought in the name of the *owners* of the *property destroyed* for the *use* of the *insurance company*. And it was held that the latter was the proper mode of bringing the action, and that it could not be brought in the *name* of the *insurance company directly*. (37 Illinois, 333, Peoria Insurance Company *vs.* Frost.) And in this Illinois case the principles we contend for in the present were also directly recognized, and the propriety of the mode of bringing the present action was directly affirmed.

In Connecticut the same principle has been recognized. (25 Conn. 265, Connecticut Mutual Life Insurance Company *vs.* New York and New Haven Railroad Company.) And in New York the right of subrogation of the underwriter, who has paid the loss to the assured, to all the rights of the assured against a common carrier has been expressly admitted. (20 N. Y. 173, Mercantile Ins. Co. *vs.* Calebs.)

And in this court, where John C. Bull & Co. were the owners of a flatboat loaded with corn, which corn was insured in the Firemen's Insurance Company of Louisville, but the flatboat was not insured: while the flatboat loaded with corn was proceeding down the Mississippi River, the steamer Memphis, belonging to the brothers Fretz, also going down, sunk the flatboat, and the corn became a total loss to Bull & Co. The insurance company paid Bull & Co. for part of loss on the corn, they not being fully insured to its value, and then instituted a libel in the name of Bull & Co. for *its use* against the brothers Fretz, owners of the Memphis, for causing by its negligence the sinking of the flatboat, whereby the corn was lost, etc. It was held by the court that the libel was properly brought in the name of the assured for the use of the insurance company. (12 How. S. C. R. 466, Fretz *vs.* Bull & Co.) And in a still more recent case in this court Gilbert Mollison was the owner of the schooner Northwestern, and John Wilson was the master of the propeller Monticello. In September, 1850, the propeller Monticello run down the schooner Northwestern on Lake Huron, by which collision the schooner and here cargo were entirely lost. Mollison, the owner of the schooner, was insured on her and her cargo, and abandoned them to the underwriters who paid him his loss. A libel was brought in the name of Mollison without saying anything about underwriters. And Wilson, master and claimant of the propeller, responded, and in his answer alleged as a defense to the libel that the schooner and her cargo had been insured and abandoned to the insurers, who had accepted the abandonment and *paid* the insurance prior to the filing of the libel. But the court held that the defense set up in the answer that the libellants had received satisfaction from the insurers could not avail the respondent; that the insurer does not stand in the relation of a joint-trespasser, so that satisfaction accepted from him shall be a release of others; that this was a doctrine

well established at common law and in admiralty, and that unless the propeller could show it made satisfaction itself to the schooner, the answer was no bar to the libel. (17 Howard S. C. R. 152, Propeller Monticello *vs.* Mollison.)

The result of the authorities then is that in all cases of marine insurance where the loss was constructively total, and the property has been abandoned to the underwriter, who has accepted the abandonment and paid the loss; or when the loss was *actually* total, and the underwriter has paid it; and also in all cases of *fire* insurance, where the underwriter *has paid* the loss, the underwriter is subrogated in *equity* to all the rights of the assured against third persons and carriers, and can prosecute such third persons in *courts of law* in the name of the assured; and that such person or carrier can not plead the payment of the loss by the underwriter to the assured as a satisfaction for the injury or loss which the third person or carrier has done to the property, or which it has suffered while in his possession. Such being the established law, the judgment of the court below is opposed by one unbroken current of authority in England and in this country.

The court below erred in sustaining defendant's demurrer to the third count in plaintiffs' declaration, and in overruling the demurrer of plaintiffs to the defendant's third plea, and rendering judgment for the defendants.

Wherefore the plaintiffs in error ask for a reversal.

WM. ATWOOD,
Of Counsel for the Plaintiffs in Error.

AUTHORITIES

RELIED ON BY PLAINTIFFS IN ERROR TO THESE POINTS.

I. Without some contract of *exemption*, carrier is responsible for loss or damage arising from an accidental fire.

1 Term R. 27, Forward *vs.* Pittard.
5 Term R. 389, Hyde *vs.* Trent and Mersey Navigation Co.
1 Smedes & Marshall, 279, Gilmore *vs.* Carman.
2 Watts, 443, Harrington *vs.* McShane.
Dudley's Law and Eq. R. 159, Patton *vs.* McGrath.
2 Richardson's Law R. 286, Swindler *vs.* Hilliard.
1 Strobhert's Law R. 203, Singleton *vs.* Hilliard.
6 Howard's S. C. R. 344, 381, New Jersey Steam Navigation Co. *vs.* Merchants Bank.
3 Wallace's S. C. R. 107, York Co. *vs.* Central Railroad.

II. After the payment of the loss by the underwriters, they were subrogated to all the rights of the assured, and could sue in his name, and the payment by the underwriters was no satisfaction by the carrier.

2d ed. Arnould on Ins., side pp. 1178–1180; 1185, 1186.
3d ed. Phillips on Ins., §§ 1707, 1711, 1723.
1 Vesey, sr. 98, Randall *vs.* Cochran.
2 Marshall on Ins. 794, reporting the case of Mason *vs.* Sainsbury.
2 Barn. & Cres. 254, Clark *vs.* Inhabitants of Blything.
4 Bingham's New Cases, 272, Yates *vs.* White.
11 Penn. R. 515, Gales *vs.* Hailman.
10 Richardson's S. C. L. R. 113, Burnside *vs.* Union Steamboat Co.
13 Metcalfe Mass. R. 99, Hart *vs.* Western Railroad Co.
39 Maine, 253, Rockingham Mut. Fire Ins. Co. *vs.* Bosher.
37 Illinois, 333, Peoria Ins. Co. *vs.* Frost.
25 Conn. R. 265, Connecticut Mut. Life Ins. Co. *vs.* New York and New Haven Railroad Co.
20 N. Y. 173, Mercantile Ins. Co. *vs.* Calebs.
12 Howard's S. C. R. 466, Fretz *vs.* Bull & Co.
17 Howard's S. C. R. 152, Propeller Monticello *vs.* Mollison.

III. Consignees may sue.

2d ed. Angell on Carriers, §§ 499–510.
19 N. H. 337, Elkins *vs.* Boston and Maine Railroad.
17 Howard's S. C. R. 100, Lawrence *vs.* Ninturn.

Etc.,

Co.

Hall & Long, for the Use of Certain Kentucky Insurance Companies,

vs.

The Nashville & Chattanooga Railroad Co.

THIS is an action brought by Hall & Long, for the use of certain Insurance Companies, to recover the value of cotton shipped by them at Chattanooga, on the road of defendant as a common carrier, which was accidentally consumed by fire, while being transported, and "became and was a total loss." The cotton had been insured by plaintiffs against loss by fire, in the companies for whose use the suit is brought, and these companies have paid the amount insured by them, respectively. The pleas are drawn with a view to raise the point sought to be decided upon demurrer, and that is, whether the underwriter who insures personal property against loss by fire, and pays the insurance upon a *total loss* by accidental burning, while in transition, can bring an action in the name of the owner, for his use against the common carrier, based upon the common law liability of such common carrier? The case, it will be noticed, is not one where the defendant has been guilty of any positive, wrongful act, resulting in loss to the owner. The defendant's liability, if it be liable at all, grows out of the rigid rules of the common law, that a common carrier is liable for accidents, and against all acts, but the acts of God and the public enemy. The point thus presented is altogether of first impression, as far as my examination and reading go; and to that extent the burden and argument is on the other side. It lies upon them to show, in the absence of precedent, strong reason and clear principles for their innovation or new invention, against which "the ancient judges and sages of the law," according to my Lord Coke, are wont to be rigid,

"lest the quiet of the common law might be disturbed:" Co. Litt., 379, *b*. Especially should this be required in a matter which must have been for many years, of frequent occurrence. This action has probably been brought upon the supposition that the doctrine of subrogation, which exists in marine insurance where there is an abandonment, and which has been supposed to apply where the interest of a mortgagee has been insured, extends to this class of cases. Let us consider these cases and see how far they go.

In marine insurance, whenever a demand is rightfully made for payment under a policy, as for a total loss, the insurance company is subrogated to all the rights of the assured to the property insured: 2 Marsh. Ins., 559. This is brought about by what is technically called an *abandonment*, which must, in all cases, be made by the assured, by notice to the insurer in a reasonable time, where the loss is not absolutely total, but merely constructively so: *Ib*, Smith's Mercantile Law, 473-476. By the abandonment the insurer becomes subrogated to all the right, title and interest of the assured, in the ship or goods insured, or what may be saved of them: Marsh. Ins., 601. In such case, and also by payment as for a total loss, the title to the property passes to the insurers; and the above abandonment goes so far as to include the *spes recuperandi* where there is anything to be recovered: *Hooper* vs. *Whitney*, 19 La. Rep., 267; *Milton* vs. *Bucks*, 5 La. Rep., N. S., 371; *Gracie* vs. *N. Y. Ins. Co.*, 8 John. R., 237–242; *Atlantic Ins. Co.*, vs. *Storrow*, 5 Paige, 285. If, for example, the policy insures against theft, and the master of the vessel is also responsible for theft actually committed, the insurers will, upon payment of the insurance, be subrogated to the *spes recuperandi* the hope of recovering the thing in specie; 5 Paige, 285. But if there is an actual loss, "where there is no vestige of the property left or (which is the same thing) where it has been finally condemned as lawful prize, by the court of last resort, the cession has nothing to operate upon. There is neither property nor *spes recuperandi*, and therefore nothing to be subrogated to:" 8 I. N., 237; *Insurance Co.* vs. *Updegraff*, 21 Penn., 513.

It will thus be seen that, in order to entitle the underwriter to subrogation, in case of marine insurance, there must be an abandonment, and something to be abandoned. The necessity of abandonment is shown by the very strong case of *Tunno* vs. *Edwards*, 12 East, 488, where, upon a valued policy, the goods were seized and sold by the enemy, and the insurance company paid half the valuation, on account, but without an abandonment; and, afterwards the

insured obtained a restoration of half the proceeds of the goods which had been seized and sold, which half exceeded the whole sum, at which the goods were valued in the policy, it was held that the insurer could not recover back the 50 per cent paid. It was contended that the underwriters having paid half stood in the situation of purchasers of half the goods. But Lord Ellenborough said "It never was contended before, and there is no principle upon which it can be contended now, that an underwriter, who has paid so much per cent. on a partial loss, is a purchaser of the goods *protanto.* * * * Though the assured has lost half his goods, and only half, and the underwriter has paid but for half, the latter claims to be repaid his 50 per centum upon the ground that this was a total loss, and that the assured has received the full value of the sum insured out of the proceeds of the other half; but, in order to have made it a total loss, *there ought to have been an abandonment,* which there has not been, therefore, there is no ground for the underwriter's claim."

It is obvious, upon these principles, that the doctrine of subrogation, in marine insurance, can have no application to the case now before the Court, for two reasons: First, there is no such thing as abandonment in fire insurance on land: 37 Ill., 333. And, second, there was here a total loss, and nothing, consequently, upon which a cession could operate. It has generally been supposed that the insurer was entitled to subrogation to the rights of the assured where the insurance was of a mortgage debt; and, until recently, the doctrine was layed down in this form: "Where a mortgagee insures his interest it is but an insurance of his debt: if the premises are destroyed by fire before the payment, or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt to the mortgagee if it does not exceed the insurance; but, then, upon such payment, the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount from the mortgagor, either at law or in equity, according to the circumstances; for the payment of the insurance, by the underwriters, does not, in such a case, discharge the mortgagor from the debt, but only changes the creditor:" Smiths' Mer. Law, 523. But this doctrine was based upon a dictum of Judge Story's, in *Carpenter* vs. *Prov. Washington, Ins. Co.,* 16 Peters, 501, and has now, upon full consideration, been overruled by the courts. Thus the enunciation of the foregoing principle, in Smiths' Mer. Law in the place cited, is followed in a late edition, by this note: "Since the former edition of this work, the doctrine stated in the last paragraph, has been elaborately re-

viewed and repudiated by the Supreme Court of Massachusetts, in *King* vs. *State Mutual Fire Insurance Company*, 7 Cush. R., 1. Chief Justice Shaw, speaking for the Court, uses this language, after a careful review of the authorities: "We are inclined to the opinion, both upon principle and authority, that when a mortgagee causes insurance to be made for his own benefit, paying the premium from his own fund, *in case a loss occurs before his debt is paid*, he has a right to *receive a total loss for his own benefit*; that he is not bound to account, to the mortgagor, for any part of the money he recovered as a part of the mortgage debt; it is not a payment in whole or in part, but he has still a right to recover his debt of the mortgagor. And so, on the other hand, when the debt is thus paid by the debtor, the money is not, *in law or equity*, the money of the insurer who has thus paid the loss, or money paid to his use." * * * "What is there inequitable on the part of the mortgagee, towards either party, in holding both sums? They are both due upon valid contracts with him, made upon adequate consideration paid by himself. There is nothing inequitable to the debtor, for he pays no more than he originally received in money loaned; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee, a full and satisfactory equivalent." The same conclusion has been reached by Vice Chancellor Wigram, in England, in *Dobson* vs. *Land*, 8 Hare, 216. The question there was upon the other branch of the proposition, whether a mortgagee in possession, in stating his account under a bill to redeem, had a right to charge premiums of insurance, obtained by himself, on buildings constituting part of the mortgaged property, and add the same to the principle and interest of his debt; and it was decided that he could not. It was conceded that this involved the correlative proposition that, if the mortgagee had received any sum by way of loss, on such policies, he would be under no obligation in equity, to credit it to the mortgagor, or be responsible to him for it. It was held in *White* vs. *Brown*, 2 Cush., 412, that if a mortgagee, in possession for condition broker, insure his interest in the premises without any agreement therefor between him and the mortgagor, and a loss occurs, which is paid to the mortgagee, the mortgagor on a bill to redeem and an account stated for the purpose, is not entitled to have the amount of such loss deducted from the mortgagee's charges for repairs. There is no privity in law or fact between the mortgagor and mortgagee in the contract of insurance, and if the mortgagee get his interest insured, and receives the amount of the insurance, it does not affect his claim

against the mortgagor. The two claims are wholly distinct and independent. *Cushing* vs. *Thompson*, 34 Maine, 496. And, *vice versa*, where the mortgagor insures for his own benefit, the mortgagee is not entitled to the money payable by the insurers on account of loss; *Carter* vs. *Roskett and others*, 8 Paige, 437. Of course it would be different in these cases, if there is a contract between the mortgagor and mortgagee, in reference to the insurance. In 6th Gill & J., 372, Professor Parsons, whose leaning is to the old law as he understood it, is compelled to change his text, and in his second volume on contracts, 440, thus writes: "The nature and extent of the insurable interest of a mortgagee, or one having a lien, have not as yet received clear and final adjudication from the Courts, and the legal rights of insurers and assured, have not been satisfactorily defined. In the first place, it may be laid down as settled law, that where a mortgagee, or one having a lien, insures his own interest in property, a payment of the loss to him by the insurers does not discharge the debt, for which the mortgage or lien is security. The want of privity between the mortgagors and insurers is a conclusive objection to the mortgagors' claim to such discharge; 16 Wend., 385, 397; 16 Peters, 495, 501; 2 Cush., 412; 13 Met., 99. Where, however, the mortgagee is trustee for the mortgagor, or where the mortgagor causes insurance to be made on the premises, payable to the mortgagee in case of loss, or where the mortgagee effects insurance at the expense of the mortgagor, with his consent, payment by the insurers would go in discharge of the debt, *ex parte:* Andrews, 2 Rose, 410; 8 Hare, 216; *Fowley* vs. *Palmer*, 5 Gray, 549. Another and a more difficult question, is, whether this same want of privity can be conclusively urged, where the insurers upon the payment of the loss to the mortgagee, (he having insured for his own benefit and paid the premium out of his own fund,) demand a transfer of a corresponding part of the mortgage debt.

The case of *King* vs. *State Mut. Ins. Co.*, 7 Cush., 1, takes very strong ground in favor of the affirmative of this question; and, here, the learned author quotes the language of that decision as above: 2 Parson, Contracts, 440; and see, also, 2 Parsons' Mer. Law, 83–5, note. In the case, *Ins. Co.* vs. *Updegraff*, 21 Penn., 513–519, the Supreme Court of Penn., in the analogous case of vendor and vendee, where the former insured, held, not only that there was no subrogation in favor of the insurance company to the vendors' debt and lien, but that the insurance enured to the benefit of the vendee: "The courts, they say, will make no presumptions in case of in-

surance by the vendor that it was his intention, in the event of a loss, that the vendee should bear not only the measure of it which fell upon him by the accident, but that he should also indemnify the insurance company; but on the contrary, every act of his in relation to the estate, will be presumed to be for the benefit of the vendee, subject of course to the prior claims of the vendor himself." Upon this principle the Nashville & Chattanooga Railroad in this case, would have more claim to consider the insurance as intended for its indemnity, than the insurance company would have to seek indemnity from it. Upon principle, it is difficult to see how any right of subrogation can exist in any of these cases, much less where the liability of the carrier originates not in a tort, but in a common law liability of the greatest hardship, and, therefore construed *strictissimi juris.*

Policies, against fire on land, have been held from the earliest time, to be personal contracts with the assured, and do not pass to an assignee or purchaser, unless by consent of the underwriters: *Lynch* vs. *Dulzele*, 3 Bro. P. Ca., 497; *Ladlers Co.* vs. *Badcock*, 5 A. & K., 554, Ang. on Ins., s. 193. It is easy to suppose cases, where the assured would not only be entitled to insurance on his property, as against the insurer, but to recover the whole of it from a wrong-doer. Thus for sample, the owner of a building has kept the same insured for twenty years in one office, during which he had paid premiums, which with interest, would equal the value of his premises, and the latter are maliciously set fire to by a third person. The insurance money, as between the assured and the insurance company, will not more than reimburse him his payments from time to time, in the policy, and it will still need his redress against the wrong-doer to place him in *statu quo.* So, also, we may suppose a merchant insuring goods for years in a company, and finally a loss occurs. In equity, the insurance company could have no claim to substitution or subrogation to any rights of action to those goods, until it had fully reimbursed the merchant, not merely the actual loss, but the premiums previously paid. The truth is, there is no right of subrogation in any such case. There is far more intrinsic equity in the railroad company's claim to the benefit of subrogation against the insurance company, which has been fully paid for the risk it has assumed, than in the claim of the latter to be subrogated to the rights of action of the assured against the railroad company, if indeed, he have any.

The case of *Mason* vs. *Lamsbury and another*, 3 Doug., 61, and one or two American authorities, based upon that decision, if they can be sustained at all upon principle, rest upon the doctrine of pun-

ishing the wrong-doer. The case in 3 Doug., was an action, in the name of the assured against the Hundred, under the statute of 1 G., I, C. 5, S. 6, for the loss of a house, demolished by rioters. The plaintiff had been paid the amount insured upon his house by the insurance company, and the suit was in reality for the benefit of the company. For the defendants it was argued that it was impossible that a plaintiff could recover, in respect of that for which he had already received a satisfaction. Having two remedies he has selected that which is most proper. Had he been short insured he might still recover the deficiency against the Hundred. The persons intended to be protected by the act, are the real owners of the property in question. An insurer is not a person damnified, because he has an adequate premium. Is he to keep his premium and yet not pay the loss? Persons can not avail themselves at law of private contracts to which they are not parties, and, therefore, equity, in some cases, allows them to sue in another's name, since the forms of law will not suffer them to do it in their own. Here, there is no equity, for the insurers do not suffer by any act of the defendants. The whole risk was covered by the premium. It was also urged that the whole argument, on the other side, went entirely upon analogies, a very fallacious mode of argument. Lord Mansfield, and a majority of the Court, held the action maintainable, upon the analogy of abandonment in marine insurance. But the real ground upon which the decision must rest, if it be good law, is that suggested by Mr. Justice Buller, that the Hundred stood in the shoes of the trespassers, the rioters, and could not avail themselves of the defense of payment by the underwriter. As against a wrong-doer the decision may be right, but, even in that view, the case appears, as suggested by the editor in a note, at variance in principle with *Bird* vs. *Randall*, 3 Burr, 1345, where a recovery by a master against his servant for leaving his service, was held a bar to a suit by the master against a third person who had induced the servant to leave the master's service.

As I have before suggested, the case now before the Court is altogether different in principle from the cases they referred to. Here, the defendant has been guilty of no wrongful act by which loss has accrued. The loss is purely accidental, and that loss has been paid by the real plaintiffs upon a contract based upon a sufficient consideration. To allow them to recover, in the name of the owner, would be to give them the benefit of the premium, without any risk. It would be, in effect, to legalize champerty. For, what they claim, is the right to have a right of action assigned them. It may be, that

where there is an equity growing out of the facts of the case, the claim might be sustained; as, for example, if the cotton had been maliciously burned by the company, or lost by willful neglect. But surely there can be no equity growing out of inevitable accident, and that an action expressly insured against for a valuable consideration. The action on the facts of the case is an equitable action, and must, to be sustainable, be based upon inherent equity. If this is to be considered as an action for a tort in the unlawful conversion or loss of the cotton, then it is clear that it can not be sustained, for a right of action for a tort is not assignable: 2 Story E. Jur., 1040, 9; *Gardiner* vs. *Adams*, 12 Wend., 297.

The railroad company and the insurance company, for whose use this suit is brought, were, so to speak, both insurers of the property lost against the risk which occurred. They both became liable by independent contracts upon independent considerations. Both are liable to the shipper, and he may recover at his election from either. But it is difficult to see any principle upon which one of these insurers can, upon payment of the loss, claim to be subrogated to the right of action of the assured as against the other. Or why the subrogation should be in favor of one more than the other. If there is any equity as between the parties, growing out of the transactions, it would seem to have the loss proportioned between them. But there is no equity in the premises, and each must abide by his contract with the shipper, and stand where he chooses to leave him. The law neither subrogates the one nor the other, to the rights of the shipper, upon adjustment of the loss.

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